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TENAGA NASIONAL BHD v. PANARENO SDN BHD; VITAL PROJECTS SDN BHD (THIRD PARTY) & SEMANTRA NO-DIG ENGINEERING SDN BHD (FOURTH PARTY)

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HIGH COURT MALAYA, KUALA LUMPUR
FAIZAH JAMALUDIN JC
[CIVIL SUIT NO: WA-22 NCVC-376-04-2014]
7 DECEMBER 2018

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TORT: *Negligence – Duty of care – Damages to plaintiff's underground oil-filled cable by developer – Contractual and statutory duty of care – Whether developer and contractors owed duty of care to ensure works envisaged under contract conducted in proper manner so as not to damage cable – Whether developer negligent in carrying out pipe works – Whether developer owed non-delegable duty of care – Whether damages foreseeable or too remote*

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TORT: *Negligence – Res ipsa loquitor – Requirements – Whether fulfilled – Whether damages would not have happened without negligence – Whether damages caused by something under sole management and control of defendant – Whether exact cause of damages known – Whether alternative proposition and alternative cause of damages sufficiently displaced inference of negligence*

E

This was a claim by the plaintiff ('TNB') for negligence against the defendant for damages caused to TNB's 132KV underground oil-filled cable from Pencawang Masuk Utama ('PMU') Damansara Heights to PMU Brickfields ('cable'). The defendant had taken third party proceedings for negligence against Vital Projects Sdn Bhd ('Vital Projects'), its contractor, whilst, Vital

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Projects had taken out a fourth party proceedings for negligence against Semantra No-Dig Engineering Sdn Bhd ('Semantra'), the subcontractor for the pipe-jacking works. The defendant, the developer of a service apartment, notified TNB that they will be commencing the laying of water pipes for the 'Integrated Water Supply Works for Proposed Serviced Apartments on Part

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of Lot 5787, Jalan Damanlela, Kuala Lumpur' ('the pipe works'). TNB replied that the pipe works could affect the safety of the cable and that the defendant must stop the said pipe works until the exact site location of the cable was ascertained. Several more correspondences were exchanged followed by a site visit. After the site visit, the defendant submitted to TNB a proposed method of conducting the pipe works. TNB replied, by its letter

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dated 19 August 2010, repeating that the proposed pipe works could affect the safety of the cable and requested the defendant to stop all its works near the cable in the area until the actual location of the cable was located. In the letter, TNB expressly stated that the defendant's application to undertake the pipe works was not approved until all the conditions stipulated in the letter

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had been agreed to and complied with in full. The defendant agreed to comply with all the conditions in TNB's letter of 19 August 2010. It was

TNB's case that the defendant failed to comply with the terms and conditions of the TNB 19 August 2010 letter, which resulted in the damages to the cable which in turn resulted in disruption to the electricity supply transmitted *via* the cable. TNB pleaded that it discovered, during its site visit on 5 December 2010, the cable was damaged by the pipe works. TNB's cause of action against the defendant was founded on the tort of negligence, wilful neglect and/or breach of duty by the defendant, its servants and/or agents in failing to comply with the express terms and conditions set out in TNB's letter dated 12 July 2010 and 19 August 2010 in carrying out the pipe works in the vicinity of the cables. TNB relied on the maxim of *res ipsa loquitor* on the basis that the damages to the cable could not have been caused but for the negligence of the defendant Vital Projects and/or Semantra. The defendant, on the other hand, pleaded that the pipe works were carried out with reasonable care and skill, the contractors had carried out the pipe works at a depth of more than 4 metres and that the damages to the cable was not foreseeable and was too remote.

Held (allowing claim):

(1) The parties and the court were bound by the defendant's pleadings that the cable was damaged and that it was caused by the pipe works. Accordingly, the cable was damaged as a direct result of the act of the defendant, its servants and/or agents in carrying out the pipe-jacking works and/or pipe works. (para 72)

(2) The expert opinion of a licensed qualified land surveyor was required to form an opinion as to the depth of the jacking pit and receiving pit and of the pipe works as it was a specialised skill that was outside the judge's knowledge and experience. Hence, the survey plan fell within the definition of expert opinion under s. 45 of the Evidence Act 1950 ('EA'). However, pursuant to s. 60 of the EA, the opinion of the surveyor must be proved by direct oral evidence of the expert who holds that opinion. In the absence of direct oral evidence from the surveyor, the survey plan was not admissible as evidence. Consequently, the defendant had failed to discharge the burden of proving the fact that the pipe works were done by its contractors at a depth of more than 4 metres pursuant to s. 103 of the EA. (paras 90-104)

(3) The defendant and its contractors did not dig a trial hole for the receiving pit of up to 4 metres. The defendant and its contractors proceeded with the pipe works before the 132KV cable was located. In fact, after the 132KV cable was located, the defendant and its contractors did not stop work and the defendant did not inform TNB that the 132KV cable was located by its contractors. The defendant and its contractors also did not obtain TNB's prior approval or consent before commencing with the construction of the receiving pit, the jacking pit and the pipe

jacking work. In the circumstances, the defendant, its servants and/or agents in carrying out the pipe works had failed to comply with the agreed terms and conditions set out by TNB in its letter dated 19 August 2010. (paras 106-110)

(4) The defendant owed TNB a contractual duty to identify the exact location of the cable before commencing the pipe-jacking works. It was also under a statutory obligation under the Electricity Supply Act 1990 to obtain TNB's authority in order to undertake the pipe works. Additionally, the defendant and its contractors owed TNB a duty of care at common law to identify the exact position of the cable before commencing with the pipe works and a duty of care to carry out the pipe works without damaging the cable. In causing damages to the cable, the defendant and its contractors were negligent and/or in breach of their duty of care in the carrying out of the pipe works. (paras 111-113)

(5) While the defendant could delegate the work to find the exact location of the cable before commencing the pipe works to Vital Projects and Semantra, the duty remained the defendant's pursuant to the conditions of the TNB's 19 August 2010 letter. The defendant thus owed the plaintiff a non-delegable duty of care. (paras 114 & 116)

(6) The damages to the cable was foreseeable and not too remote. The defendant was told to stop the pipe works until the exact location of the cable was ascertained as the pipe works could affect the safety of the cable. However, evidence showed that after encountering the monsoon drain, the defendant and its contractors, without consulting TNB, unilaterally decided to proceed with the construction of the receiving pit next to the location stipulated by TNB for the trial hole. Also, in breach of the 19 August 2010 conditions of TNB, Semantra constructed the receiving pit at the green area beside the road curb without first locating the cable. (paras 121, 123 & 125)

(7) In order for TNB to rely on *res ipsa loquitor*, it must be shown that (i) the damages to the cable would not have happened without negligence; (ii) the damages were caused by something under the sole management and control of the defendant or someone for whom it was responsible or whom it had a right of control; and (iii) the exact cause of the damages was not known. Based on the evidence, it could be inferred that the damages to the cable could not have happened without the negligence of the defendant and its contractors. The cause of the damages to the cable was something under the management and control of the defendant's contractors for whom it was responsible for and the exact cause of the damage to the cable was also not known. Further, the alternative proposition that the cable was not in fact damaged and the

alternative causes of damages to the cable put forward by the defendant, Vital Projects and Semantra were insufficient to displace the inference of negligence on the part of the defendant and its contractors. Therefore, TNB could rely on the maxim of *res ipsa loquitor*. (paras 128, 131, 132, 140, 141 & 143-153)

(8) Vital Projects had a duty of care to ensure that all the works envisaged under the contract for the pipe works were conducted in a proper manner so as not to damage the cable and a contractual duty, pursuant to the letter of award dated 16 July 2010, to ensure that the pipe works were carried out in accordance with conditions imposed by the authorities, including TNB. However, Vital Projects had failed to comply with the terms and conditions of the letter of award and had breached its duty of care owed to the defendant. Accordingly, the defendant was entitled to full indemnity from Vital Projects for damages and costs that the defendant was liable to pay the plaintiff. Based on the letter of award dated 16 July 2010, Vital Projects was entitled to its counter-claim from the defendant for the balance of contract price for the pipe works. The defendant was entitled to set-off the balance of the contract price owed against the damages and costs that the defendant was liable to pay the plaintiff. (paras 156-160)

(9) Semantra owed a duty to Vital Projects to carry out the pipe jacking works in accordance with the terms and conditions evidenced in the letter of award dated 8 October 2010 from Vital Projects, which included compliance with TNB's requirements and conditions. It also owed Vital Projects a duty of care that the pipe jacking works were carried out in a proper manner without causing any damage to the cable. However, Semantra did not adduce any evidence to show that it had fully complied with the terms and conditions of the letter of award, including the conditions imposed by TNB, and that it had not breached its duty of care to Vital Projects. Vital Projects was entitled to full indemnity from Semantra for the damages and costs to be paid by Vital Projects to the defendant. (paras 162-165)

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Bennett v. Chemical Construction (GB) Ltd [1971] 1 WLR 1571 ***(refd)***
Chandrasekaran & Ors v. PP [1970] 1 LNS 11 HC ***(refd)***
Chua Yung Kim v. Madlis Azid & Ors [2018] 3 CLJ 47 CA ***(refd)***
Gnanasegaran Pararajasingam v. PP [1997] 4 CLJ 6 CA ***(refd)***
Hanafi Mat Hassan v. PP [2006] 3 CLJ 269 CA ***(refd)***
KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***
Leong Wing Kong v. PP [1994] 2 SLR 54 ***(refd)***
Lloyde v. West Midlands Gas Board [1971] 1 WLR 749 ***(refd)***
Melawangi Sdn Bhd v. Lim Kian Hian [2017] 1 LNS 1473 CA ***(refd)***
Munusamy Vengadasalam v. PP [1987] 1 CLJ 250; [1987] CLJ (Rep) 221 SC ***(refd)***

Saiman Umar v. Lembaga Pertubuhan Peladang [2015] 9 CLJ 153 FC ***(refd)***
Syed Abu Bakar Ahmad v. PP [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368 FC ***(refd)***
Tenaga Nasional Bhd v. Syarikat Bekalan Air Selangor Sdn Bhd & Anor [2017] 6 CLJ 356 CA ***(refd)***
Teoh Guat Looi v. Ng Hong Guan [1998] 4 CLJ 416 CA ***(refd)***
Tiow Weng Theong v. Melawangi Sdn Bhd [2019] 2 CLJ 655 CA ***(refd)***
Wong Kok Keong v. Regina [1954] 1 LNS 125 HC ***(refd)***
Woodland v. Essex County Council [2014] 1 All ER 482 ***(refd)***
Woods v. Duncan [1946] AC 401
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA ***(refd)***

Legislation referred to:
Electricity Supply Act 1990, s. 37(12)(a)
Evidence Act 1950, ss. 45, 60(1)(d), 90A(1), (2), (6), 103, 114(g)
Rules of Court 2012, O. 34 r. 2(2)(e)

Other source(s) referred to:
Augustine Paul, *Evidence: Practice and Procedure,* 4th edn, p 512
Clerk & Lindsell on Torts, 20th edn, p 542

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Reported by S Barathi

JUDGMENT

Faizah Jamaludin JC:

Introduction

[1] This is a claim by the plaintiff, Tenaga Nasional Berhad ("TNB") for negligence against the defendant for the damages caused to TNB's 132KV underground oil-filled cable from Pencawang Masuk Utama ("PMU") Damansara Heights to PMU Brickfields ("the cable").

[2] The defendant has taken third-party proceedings for negligence against the third party, Vital Projects Sdn Bhd ("Vital Projects"), its contractor for the pipe works (as defined below). Vital Projects has in turn taken out fourth party proceedings for negligence against the fourth party, Semantra No-Dig Engineering Sdn Bhd ("Semantra"), who was the subcontractor for the pipe jacking works.

[3] After considering the evidence before this court, the testimonies of the witnesses during the trial and the submission of counsels, I found that TNB has successfully proven on a balance of probabilities that the cable was damaged and that the damage was caused by the defendant's and/or its contractors' negligence and/or breach of duty of care.

[4] I also found that the defendant owed TNB a non-delegable duty of care.

[5] For the reasons stated herein, I found that TNB is entitled to rely on the maxim of *res ipsa loquitor* in proving its claim against the defendant in this case. I found that the alternative explanation provided by the defendant and its contractors insufficient to displace the inference of negligence on the part of the defendant, Vital Projects and Semantra.

[6] As regards the defendant's third-party claim against Vital Projects, I found that Vital Projects owed the defendant a contractual duty to comply with the conditions imposed by TNB and a duty of care to ensure that the pipe works were conducted in a proper manner so as not to cause any damage to the cable.

[7] In respect of Vital Project's fourth party claim against Semantra, I found that Semantra owed Vital Projects a contractual duty to comply with the conditions imposed by TNB and a duty of care to ensure that all the pipe jacking works were carried out in a proper manner without causing any damage to the cable.

[8] The reasons for my decision are as set out herein.

Background Facts

[9] TNB is a limited liability company licensed under the Electricity Supply Act 1990 ("ESA 1990") for the generation, transmission and distribution of electricity supply in Malaysia. In or about 1986, TNB had installed the cable below the road surface from PMU Damansara Heights to PMU Brickfields.

[10] The defendant is the developer of a service apartment in Damansara Heights known as "Twins @ Damansara Heights" ("the project"). The defendant, by a letter dated 30 June 2010 from their civil and engineering consultants, Asia Pacific Engineering Consortium Sdn Bhd, ("APEC") notified TNB that they will be commencing the laying of water pipes for the "Integrated Water Supply Works for Proposed Serviced Apartments on Part of Lot 5787, Jalan Damanlela, Kuala Lumpur" ("the pipe works") on 15 July 2010.

[11] TNB replied APEC by a letter dated 12 July 2010 informing them that the pipe works could affect the safety of the cable and that the defendant must stop the said pipe works until the exact site location of the cable was ascertained. Several more correspondences were exchanged thereafter and a site visit was held on 16 August 2010, which was attended by representatives of TNB, the defendant, Vital Projects and Semantra.

[12] After the site visit, the defendant by a letter dated 18 August 2010, submitted to TNB a "method statement" outlining the defendant's proposed method of conducting the said pipe works.

[13] TNB replied the defendant's letter the next day, by its letter dated 19 August 2010 (the "TNB 19 August 2010 letter"), repeating that the proposed pipe works could affect the safety of the cable and requesting the defendant to stop all its works near the cable in the area until the actual location of the cable is located. The TNB 19 August 2010 letter expressly stated the defendant's application to undertake the pipe works is not approved until all the conditions stipulated in the said letter have been agreed to and complied in full.

[14] The defendant agreed to comply with all the conditions stipulated in the said TNB 19 August 2010 letter. The letter was signed on behalf of the defendant by its general manager. The words above the defendant's company chop and general manager's signature stated:

> Saya/Kami bersetuju mematuhi kesemua "Syarat-syarat Untuk Kerja-Kerja Berhampiran Kabel TNB" yang di atas.

[15] It is the plaintiff's case that the defendant failed to comply with the terms and conditions of the TNB 19 August 2010 letter, which resulted in the damage to the cable.

[16] On 4 December 2010, at approximately 4.49pm, the electricity supply transmitted *via* the cable was disrupted. TNB was alerted of the disruption when the alarm at the PMU Damansara Heights was triggered; indicating a drop in the oil pressure of the cable. Its cable team discovered that the oil pressure at various points of the cable had dropped causing a trip of the power supply. TNB pleads that it discovered that the cable was damaged by the pipe works during a visit to the site on 5 December 2010. TNB's employee, SP2, lodged a police report on 6 December 2010 as regards the incident.

Proceedings

(i) TNB's Claim

[17] TNB commenced this present action against the defendant on 5 August 2014. Its cause of action against the defendant is founded on the tort of negligence, wilful neglect and/or breach of duty by the defendant, its servants or agents in failing to comply with the express terms and conditions set out in TNB's letters dated 12 July 2010 and/or 19 August 2010 in carrying out the said pipe works in the vicinity of the cables.

[18] Details of the alleged negligence, wilful neglect and/or breach of duty are particularised in para. 16 of the statement of claim. TNB relies on the maxim of *res ipsa loquitor* on the basis that the damage to the cable could not have been caused but for the negligence of the defendant, Vital Projects and/or Semantra who had knowledge that the cable was present in the vicinity of the pipe works and they proceeded to carry out the pipe works in a manner which caused damage to the cable.

[19] The TNB 19 August 2010 letter is central to this suit. It contains TNB's express request that the defendant stops the pipe works until the exact position of the cable was located. It also sets out the exact conditions that the defendant has to comply with in order to obtain TNB's approval for the pipe works. The salient provisions of the letter is reproduced below:

> Untuk makluman pihak tuan, kerja-kerja tuan di kawasan terbabit boleh menjejaskan keselamatan 132KV kabel sediaada TNB seperti berikut:
>
> | No. | Bahan Kabel | Bilangan Kabel |
> |---|---|---|
> | 1 | Kabel Berisi Minyak 132KV DARI PMU Brickfields ke PMU Damansara Heights | 2 litar |
>
> Dengan itu, *pihak tuan perlu menghentikan segala kerja-kerja syarikat tuan berdekatan kabel TNB di kawasan tersebut sehingga penyelesaian terhadap kedudukan sebenar kabel TNB di kawasan tersebut dapat dicapai* serta menjamin keselamatan peralatan TNB tersebut secara amnya.
>
> Dukacita dimaklumkan bahawa permohonan pihak tuan untuk menjalankan kerja-kerja lubang percubaan di kawasan terbabit adalah tidak diluluskan sehingga syarat-syarat yang dinyatakan dibawah, dipersetujui dan dipatuhi sepenuhnya.
>
> Pada masa ini, kerja-kerja tuan di tapak ini hendaklah mematuhi syarat-syarat yang berikut:
>
> 1. Kedudukan sebenar kabel-kabel TNB kawasan terlibat hendaklah terlebih dahulu dikenalpasti dan ditanda dengan "danger tape" di sepanjang laluan kabel. **Lubang percubaan perlu dikorek untuk mengenal pasti kedudukan sebenar kabel TNB tersebut.** Kos pengorekkan lubang percubaan akan ditanggung sepenuhnya oleh pihak kontraktor.
> 2. Pihak kontraktor perlu menangung kos pemasangan perlindungan mekanikal sekiranya perlindungan diperlukan.
> 3. Semua kos bagi mengenalpasti dan melindungi kabel-kabel berkenaan akan ditanggung sepenuhnya oleh pihak tuan.

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4. **Kerja-kerja berhampiran dengan kabel TNB perlu diseliakan oleh seorang kakitangan kompeten daripada jabatan ini.** Untuk tujuan ini, pihak kontraktor boleh menghubungi En. Goh (013-3885211) atau En. Balan (019-2798446). Penyeliaan oleh jabatan ini adalah PERCUMA.

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5. Kerja-kerja pipe jacking pihak tuan hendaklah pada kedalaman minima 4m daripada paras jalanraya dan receiving pit hendaklah berada di tepi road curb selepas jalan raya. **Receiving pit perlulah dijalankan lubang percubaan sedalam 4m untuk memastikan tiada kabel sediaada TNB dilokasi terbabit.** Disamping itu, tuan juga diminta untuk kerja-kerja korekan terbuka (open cut) pada kedalaman maksima 1m daripada paras jalan raya.

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6. **Pihak tuan hendaklah bertanggungjawab sepenuhnya keatas kesemua aktiviti-aktiviti di atas atau sebarang kerosakan ke atas kabel dan/atau pepasangan lain milik TNB.**

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Untuk itu pihak tuan hendaklah bersetuju untuk membayar segala ganti-rugi yang bakal ditanggung oleh TNB termasuk ganti-rugi bagi kerja-kerja membaik-pulih kerosakan tersebut, kerugian akibat kehilangan penjualan tenaga elektrik dan sebarang tuntutan lain yang dibuat oleh pihak ketiga khususnya penguna-penguna TNB yang terlibat.

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Ini juga merangkumi sebarang kerosakan keatas kabel pepasangan TNB selepas semua kerja-kerja yang dijalankan oleh pihak tuan selesai dilaksanakan sekiranya punca kerosakan adalah terbit daripada aktiviti-aktiviti yang dijalankan oleh pihak tuan.

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Sayugia dimaklumkan bahawa aktiviti-aktiviti yang membahayakan pepasangan elektrik adalah bercanggah dengan Akta Bekalan Elektrik 1990 Seksyen 37 (12a):

…

(emphasis added)

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(ii) The Defendant's Defence

[20] The defendant's position is that the maxim of *res ipsa loquitor* is not applicable because it did not have sole control over the location and the incident was not caused by the defendant's negligence as the pipe work was carried out by an independent contractor and/or its subcontractor who had control of the location when the incident happened.

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[21] The defendant pleads that the pipe works were carried out with reasonable care and skill. The defendant also pleads that the contractors had carried out the pipe works at a depth of more than 4 metres and that the damage to the cable was not foreseeable and was too remote.

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Trial

[22] The trial of this suit was held over a period of seven days. By agreement of all the parties, the trial proceeded on the issue of liability only. TNB prayed for damages to be assessed by this court if the defendant and/or its contractors are found liable for the damage to the cable.

[23] The witnesses who gave evidence at the trial were the following:

Witness	Name	Position
TNB'S WITNESSES		
SP1	Nagarajah a/l Murugesu	TNB's certified competent person
SP2	Abdul Halim bin Embi	TNB's employee
SP3	Goh Cheah Hoe	TNB's engineer
DEFENDANT'S WITNESS		
SD1	Liew Choon Yick	Senior General Manager of Lion group of companies
THIRD PARTY'S WITNESSES		
STP1	Tai Ah Chai	Director of Third Party
STP2	Tai Yee Wai	Director of Third Party
FOURTH PARTY'S WITNESSES		
SFP1	Wong Yew Choong	Director of Fourth Party
SFP2	Muazam bin Mustaffa	Senior Manager of Suffian Geometrics Services
EXPERT WITNESSES (Common Expert Witness for Defendant, Third Party & Fourth Party)		
CEW1	Lau Keat Soon	Engineer

(a) Between TNB And The Defendant

[24] The agreed issues to be tried between TNB and the defendant on the issue of liability are as follows:

(i) whether the cable was damaged as a direct result of the act of the defendant, its servants and/or agents, in carrying out the relevant piping works and/or the said pipe works;

(ii) whether in carrying out the relevant piping works and/or the said pipe works, the defendant, its servants and/or agents had complied with the conditions and specifications set out by TNB;

(iii) whether the defendant is in negligence, wilful neglect and/or breach of their duty of care in carrying out the relevant piping works and/or the said pipe works;

(iv) if para. (ii) above is answered in the affirmative, whether the damage caused to the cable was reasonably foreseeable;

(v) whether the plaintiff is entitled to rely on the maxim of "*res ipsa loquitor*" in proving its claim against the defendant in the circumstances of this case.

(b) Between The Defendant And The Third Party

[25] The agreed issues to be tried between the defendant and the third party are:

(i) whether the defendant is entitled to full indemnity from the third party for its losses and damage, in the event the defendant is liable to pay the plaintiff;

(ii) whether the third party has breached its duty of care during the performance of the works to ensure that all the works envisaged under the contract are conducted in a proper manner;

(iii) whether the third party's counterclaim should be allowed; and

(iv) whether the defendant's defence of set-off should be allowed.

(c) Between The Third Party And The Fourth Party

[26] The agreed issues to be tried between the third party and the fourth party are:

(i) whether the third party is entitled to full indemnity from the fourth party for its losses and damage, in the event the third party is liable to pay the defendant;

(ii) whether the fourth party owes a duty of care to the third party during the performance of the said works to ensure that all the works envisaged under the contract are conducted in a proper manner without causing any damage.

Analysis

Issue 1: Whether The Cable Was Damaged As A Direct Result Of The Act Of The Defendant, Its Servants And/Or Agents, In Carrying Out The Relevant Piping Works And/Or The Said Pipe Works?

(i) TNB's Case

[27] It is TNB's case that based on the defendant's pleadings, this first issue should be answered in the affirmative. TNB submits that the contents of paras. 9 and 10 of the defendant's final amended defence (as defined below), read together, clearly shows that the defendant never disputed that the cable was damaged and that the pipe works were the cause of the damage to the cable. What is disputed by the defendant is the extent of the damage to the cable and whether the damage was foreseeable.

(ii) The Defendant's, Vital Projects' and Semantra's Pleaded Defences

(a) *The Defendant's Defence*

[28] The defendant in their defence dated 15 September 2014 did not deny that the cable was damaged but plead that the damage was not foreseeable and was too remote. The defendant pleads that reasonable care and skill were taken in carrying out the pipe works and that the contractors had carried out the pipe works to a depth of more than 4 metres.

[29] In paras. 9 and 10 of its defence, the defendant pleads:

> 9. The Defendant states that the damage of the Plaintiff's underground cable was not foreseeable and too remote. The Work was carried out by the contractors in accordance with the Plaintiff's instructions and requirements and with the supervision of the Plaintiff's personnel. After constructing the receiving pit to a depth of more than 4 metres, the contractors did not detect the 132KV oil-filled cables. *The Defendant states that it could not have been within the Defendant's knowledge that the subject underground 132KV oil-filled cable would still be hit at the depth of 4.525 metre which was beyond their control and foreseeability.*
>
> 10. The Defendant has no knowledge on the statement in paragraph 13, *save and except that the 132KV oil-filled cables were damaged.* The Defendant states that tests were carried out by the Plaintiff on the damaged cables after the incident. *The Defendant states that the test results would be able to show which part of the cable is damaged and the extent of the damage of the cables to ascertain the losses suffered.* (emphasis added)

[30] The defendant pleads in para. 13 of its defence:

> Paragraphs 16 of the Statement of Claim is denied and the Plaintiff is put to strict proof. **The Defendant reiterates that reasonable care and skill has been taken.** The Defendant states that the Works had been carried out by the contractors at a depth of more than 4 metres and the damage on the 132KV oil-filled cable is not foreseeable. (emphasis added)

[31] In para. 14 of its defence, the defendant pleads in the alternative that TNB was contributorily negligent in setting the depth of 4 metres from the road surface as the minimum depth in which the pipe jacking works should be carried out. However, no particulars of the contributory negligence were pleaded in the defence.

[32] The defendant later sought to amend its pleadings in para. 10 of the amended defence by removing the words in bold and struck-through below:

> 10. The Defendant has no knowledge on the statement in paragraph 13, ~~**save and except that the 132KV oil-filled cables were damaged**~~. The Defendant states that tests were carried out by the Plaintiff on the ~~**damaged**~~ **132KV oil-filled** cables after the incident. The Defendant states that the test results would be able to show **which part of the cable is damaged and** the extent of the damage of the cables to ascertain the losses suffered.

[33] The amendment was allowed by the Deputy Registrar on 17 December 2014. But on appeal by TNB to the judge-in-chambers, the deletion of the said words in para. 10 was disallowed and was accordingly reinstated in the defence by order of the judge on 25 June 2015. The defendant did not appeal the judge's decision.

[34] However, when the trial commenced, the parties were under the mistaken impression that the defence as it stood was the amended defence dated 17 December 2014 rather than amended defence following TNB's successful appeal to the judge-in-chambers dated 25 June 2015. This error was realised by TNB's counsel and the correct amended defence was filed on 17 January 2018 after trial had commenced (encl. 110 and marked as bundle "PT").

[35] Accordingly, the correct pleading in para. 10 as in the amended defence dated 25 June 2015 ("final amended defence") reads as below:

> 10. The Defendant has no knowledge on the statement in paragraph 13, save and except that the 132KV oil-filled cables were damaged. The Defendant states that tests were carried out by the Plaintiff on the damaged 132KV oil-filled cables after the incident. The Defendant states that the test results would be able to show which part of the cable is damaged and the extent of the damage of the cables to ascertain the losses suffered.

(b) *Vital Projects' Defence*

[36] Vital Projects' defence is that it had complied with all the terms and conditions of the award by the defendant and that the damage to the cable was not foreseeable and too remote.

(c) *Semantra's Defence*

[37] Semantra's defence is that it denies that it had caused the damage to the cable. In para. 11 of its defence to the third party's amended statement of claim, Semantra pleads that the pipe-jacking works were completed on 3 December 2010 without any damage incident reported and that it had handed over the site to the Vital Projects on 4 December 2010 for the latter to install the "ms water pipes".

(iii) The Defendant's, Vital Projects' And Semantra's Approach During Trial And Submissions

[38] However, at the trial, the defendant adopted an approach that was at odds with its pleaded case in the final amended defence. Vital Projects and Semantra also adopted an approach that was not in line with their respective defences. They sought to challenge the evidence of TNB's witnesses as to whether there was even the presence of a 132KV oil-filled cable within the ducting of the cable shown in the photographs taken by SP2. They also submitted that the cable was not damaged.

[39] The defendant's counsel, Ms Cindy Goh, submits that SP2 did not go into the receiving pit at all and that he is not telling the truth. Ms Goh urged this court not to give any weight to SP2 testimony. The defendant's allegation that SP2 is not the maker of the photographs surfaced for the first time during the cross-examination of SP2. Mr E.T. Low, counsel for Semantra, suggested to SP2 that he did not take the photographs and that he did not go into the hole. And Mr C.W. Chan, counsel for Vital Projects, suggested that the photographs were taken elsewhere. These suggestions go to the relevancy of the photographs to this present action.

[40] The defendant, contrary to its pleaded defence, submits that TNB had failed to show that the cable was damaged. It claims that photographs of the damaged cable in bundle B4 pp. 15-23 shows empty ducting and not any damaged cable. It submits that TNB had failed to prove that the defendant and its contractors had caused the damage to the cable.

[41] The defendant also submits that TNB had failed to prove that the disruption in the electricity was caused by the damage to the cable near the pipe works. With respect, I find this submission puzzling as TNB's claim against the defendant as pleaded in its statement of claim is for the damage to the cable and not for the disruption to the electricity resulting from the damage to the cable.

(iv) Is The CD Of The Video ("IDD2") Admissible As Evidence?

[42] During the trial, much issue was taken on the exact date the defendant and its contractors went to the site with SP2 and SP3 after the damage was discovered. SP2 and SP3 testified that they had gone to the site with

representatives of the defendant, Vital Projects and Semantra on 5 December 2010. SP2 filed a police report on 6 December 2010 stating that he went to the site on 5 December 2010 to investigate a damaged cable. Whereas STP1 testified that he went to the site on 6 December 2010 and he had filed a police report on the same day. Vital Projects produced a CD (marked as "IDD2") of a video, which STP1 said he recorded to support STP1's contention that the site visit was on 6 December 2010.

[43] The video and the CD of the video were both produced by computers. Admissibility of documents produced by computer and statements contained therein are governed by s. 90A of the Evidence Act 1950 ("EA 1950"). The section is an exception to the hearsay rule.

[44] Section 90A(1) of the EA 1950 expressly states that a document which was produced by a computer is only admissible if it was produced by a computer in the ordinary course of its use. It states:

> (1) In any criminal or civil proceeding a document produced by a computer, or a statement contained in such document, shall be admissible as evidence of any fact stated therein if the document was produced by the computer in the course of its ordinary use, whether or not the person tendering the same is the maker of such document or statement.

[45] The Federal Court in *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800; [2009] 2 MLJ 613 held that the *prima facie* position under s. 90A is that the only condition for admissibility of a document produced by a computer and of the statement in the document is that the document was produced by the computer in the ordinary course of its use. The Court of Appeal in *Hanafi Mat Hassan v. PP* [2006] 3 CLJ 269; [2006] 4 MLJ 134 held that:

> [18] … the condition precedent in s. 90A(1) coupled with the stipulation on the manner of its proof makes it clear in unmistakable terms *that a document made admissible by the section is only one that was produced by a computer in the ordinary course of its use; and inapplicable to one that was not so produced.* (emphasis added)

[46] Section 90A(2) of the EA 1950 states that:

> (2) For the purposes of this section it **may** be proved that **a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person** who either before or after the production of the document by the computer is **responsible for the management of the operation of that computer, or for the conduct of the activities for which that computer was used.** (emphasis added)

[47] The Court of Appeal in *Gnanasegaran Pararajasingam v. PP* [1997] 4 CLJ 6; [1997] 3 MLJ 1; [1997] 3 AMR 2841 held that what are required to be proved in order to render a document admissible under s. 90A are that (i) the document was produced by a computer, and that (ii) it was produced by the computer in the ordinary course of use. Because of the word "may"

in s. 90A(2), the Court of Appeal in *Gnanasegaran Pararajasingam* held that these matters can be proved by the tendering of oral evidence to show that the document was produced by a computer as an alternative mode of proof to the use of a certificate. This decision in *Gnanasegaran Pararajasingam* was followed by the Federal Court in *Ahmad Najib Aris*, where the Federal Court held that, because of the word "may" in s. 90A(2), a certificate under sub-s. (2) is not mandatory for proving that a document was produced by a computer in the course of its ordinary use. The court held that as long as there is proof that a document is produced by a computer, s. 90A(6) applies to deem the document to be produced by the computer in the course of its ordinary use.

[48] Accordingly, a document can be proved to have been produced by a computer in the ordinary course of its use either:

(i) by a certificate signed by a person responsible for the management of the operation of the computer used to produce the document or the conduct of activities for which the computer was used, may be tendered to prove that a document was produced in the course of its ordinary use (pursuant to s. 90A(2) of the EA 1950); or

(ii) by oral evidence adduced to establish the requirements in s. 90A(1).

[49] Augustine Paul JCA in delivering the judgment of the Court of Appeal in *Hanafi bin Mat Hassan* held that:

> [18] … Thus the use of the certificate can be substituted with oral evidence as demonstrated in *R v. Shepherd* [1993] 1 All ER 225 in dealing with a provision of law similar to s. 90A. *Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is adduced to establish the requirements of s. 90A(1) in lieu of the certificate the presumptions attached to it, in particular, the matters presumed under s. 90A(4) must also be proved by oral evidence.* In commenting on the nature of the evidence required to discharge the burden in such an event Lord Griffiths said in *R v. Shepherd* [1993] 1 All ER 225 at p 231:
>
> > The nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly.

[50] Vital Projects did not produce any certificate under s. 90A(2) to prove that the CD of the video was produced by the computer in the course of its ordinary use. It also did not tender any oral evidence by the maker of the CD that the CD of the video was produced in the ordinary use of the computer. Accordingly, the CD of the video is not admissible, as it had not complied with requirements of admissibility under s. 90A of the EA 1950.

[51] Furthermore, Vital Projects did not establish the chain of evidence leading to the production of the CD containing the video. It did not produce an expert report to show that the video had been examined and had not been modified or edited. When STP1 was asked by TNB's counsel whether he had sent the SD card to an expert for it to be examined as to whether the recording had been edited in any way, STP1 replied no.

[52] STP1's testimony is that he brought a video camera along to the site inspection for purposes of recording the inspection. I find it very difficult to believe his testimony that he only took a five seconds video showing SP2 and SP3 and nothing else during the whole process of the inspection which was conducted together with the representatives of TNB, the defendant and Semantra. From my viewing of the video during the course of trial, it was obvious to me that the video was edited to just pick five seconds showing SP2 and SP3.

[53] For the reasons above, I find that the CD containing the video is not admissible as evidence in this court. Accordingly, the date of the video of "6 December 2010" cannot be used to support the defendant's and Vital Projects' contention that the site visit took place on 6 December 2010 instead of 5 December 2010.

(v) Parties Are Bound By Their Pleadings

[54] In this present case, the defendant does not plead that the cable was not damaged. In fact, the defendant does not deny that the cable was damaged but pleads that the damage was not foreseeable and was too remote. The defendant submits that it had always disputed that the cable was damaged by the defendant or its contractors and cites its denial of para. 16 of the statement of claim to support this contention.

[55] In para. 16 of the statement of claim, TNB pleads that the damage to the cable was caused by the negligence, wilful neglect and/or breach of duty of the defendant, its servants or agent and goes to particularise the negligence, wilful neglect and/or breach of duty. The defendant in para. 13 of its final amended defence pleads:

> 13. Paragraphs *(sic)* 16 of the Statement of Claim are denied and the Plaintiff to strict proof. The Defendant reiterates that reasonable care and skill has been taken. The Defendant states that the Works had been carried out by the contractors at a depth of more than 4 metres and the damage on the 132 kV oil-filled cable is not foreseeable.

[56] In para. 9 of the final amended defence, the defendant pleads: A

> ... The Defendant states that it could not have been within the Defendant's knowledge that the subject underground 132KV oil-filled cable would still be hit at the depth of 4.525 metre which was beyond their control and foreseeability.

[57] On the plain and ordinary reading of paras. 9, 10 and 13 of the final amended defence, I find that the defendant does not deny that the damage to the cable was caused by the pipe works but it pleads that the defendant, its servants or agents are not guilty of negligence, wilful neglect and/or breach of duty because they took reasonable care and skill and because the damage was not foreseeable and too remote. B C

[58] Vital Projects also does not plead that the cable was not damaged. Its pleaded case is that the damage to the cable was not foreseeable and too remote. Semantra's pleaded case is that it did not cause the damage to the cable and pleads that it is not responsible to bear the full losses for the damage to the cable ("pihak keempat adalah tidak bertanggungjawab untuk menanggung rugi *(sic)* penuh kerosakan kabel tersebut ..."). D

[59] It is trite law that parties are bound by their own pleadings. As reiterated by Azahar Mohamed FCJ when delivering the decision of the Federal Court in *Saiman Umar v. Lembaga Pertubuhan Peladang* [2015] 9 CLJ 153; [2015] 6 MLJ 492: E

> [41] **We should remind ourselves that parties to an action are bound by their own pleadings. It is therefore necessary to make the point that the court is also bound by the pleadings in as much as the parties themselves.** The most important purpose of pleadings is to plead reasonable cause of action, define the issues of fact and questions of law to be determined by the court. It is a valid argument to make that the court is constrained to decide an action on which no issue has been raised by the parties in their respective pleadings (see *Ambank (M) Bhd v. Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1; [2012] 3 MLRA 459 and *Victory Avenue Mfg (M) Sdn Bhd v. Matsushita Electronic Devices (M) Sdn Bhd* [2009] 5 MLJ 243). (emphasis added) F G

[60] Therefore, it is not open for the defendant, Vital Projects and Semantra to submit that the cable was not damaged by the pipe works. It is also not open to the court to consider the defendant's submission that the cable was not damaged because as reminded by the Federal Court in *Saiman bin Umar*, "the court is also bound by the pleadings as much as the parties themselves." H

[61] Counsel for TNB, Mr. Balvinder Singh Kenth, submits that these various challenges on TNB's witnesses were an exercise in futility given the defendant's pleaded case. Ms Cindy Goh, counsel for defendant submits that since TNB did not raise any objections when the questions on whether the damage was caused by the pipe works was posed to TNB's witnesses during I

A the trial, this shows that the plaintiff was not prejudiced as they were not surprised by the defence. The defendant submits that TNB is, accordingly, not allowed to raise this issue during submissions and cites *KEP Mohamed Ali v. KEP Mohamed Ismail* [1981] 2 MLJ 10; [1980] 1 LNS 169 to support this contention.

B **[62]** In my view, the decision in *KEP Mohamed Ali* can be distinguished from this case. In that case, limitation had set in when the plaintiff filed the suit in 1974 against the defendant for sums owing. Two years later, in 1976, the defendant entered into an agreement with the plaintiff acknowledging the sum owing. The Judicial Commissioner in that case held that the new C agreement which was made by the parties after pleadings was closed was an attempt to revive a cause of action that was statute-barred. The facts relating to acknowledgment were material facts upon which the plaintiff had intended to rely on in his action for recovery of the debt, which but for the defendant's acknowledgment would be statute-barred. The Federal Court held that since D the plaintiff had adduced evidence during the trial that the defendant had acknowledged that the debt owing, the case relating to the acknowledgment was successfully presented and developed and the defendant was not taken by surprise. Raja Azlan CJ (Malaya) (as HRH then was) in delivering the judgment of the Federal Court held that in the circumstances "to condemn E a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded."

[63] In this present case, the defendant's pleaded defence is not that the cable was not damaged or that the pipe works did not cause the damage. The F defendant's defence is that it had taken reasonable care and skill in conducting the pipe works and that the damage was not foreseeable and was too remote. In *KEP Mohamed Ali*, the Federal Court held that to condemn the plaintiff in that case because he was unable to plead material fact because it took place after the close of pleadings was a great denial of justice.

G **[64]** In my opinion, in this present case, unlike the situation in *KEP Mohamed Ali*, it would not be a "great denial of justice" to the defendant not to allow it to submit a case which it had not pleaded. This is because the defendant could have pleaded in its defence that the cable was not damaged; that there was no cable in the ducting; SP2 did not go down into the receiving H pit to take the photographs; and/or that the photographs were taken elsewhere, because all these alleged facts would have taken place long before the writ of summons for this action was filed and pleadings were closed.

[65] Moreover, prior to the commencement of the trial in this suit, the defendant, Vital Projects and Semantra had accepted that the photographs are I genuine and had agreed for the said photographs to be placed in Part B of the common bundles of documents.

[66] Order 34 r. 2(2)(e) of the Rules of Court 2012 ("ROC") provides that:

2. Pre-trial case management when directed by the Court (O. 34 r. 2)

(2) At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including:

…

(c) the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party, including documents referred to in the witness statement of a witness;

(d) the contents of the bundle of the documents referred to in subparagraph (c) shall be agreed on between all parties as far as possible and this bundle of agreed documents shall be filed by the plaintiff and marked as Part A;

(e) if the parties are unable to agree on certain documents, those documents on which agreement cannot be reached shall be included in separate bundles and each such bundle shall be filed by the plaintiff and marked as follows:

(i) Part B - documents where the authenticity is not disputed but the contents are disputed;

(ii) Part C - documents where the authenticity and contents are disputed;

[67] The Court of Appeal in the recent cases of *Melawangi Sdn Bhd v. Lim Kian Hian* [2017] MLJU 845; [2017] 1 LNS 1473 and *Tiow Weng Theong v. Melawangi Sdn Bhd* [2019] 2 CLJ 655; [2018] MLJU 845 clarified the position with regard to the effect of classification of documents for trial pursuant to O. 34 r. 2(2) of the ROC. David Wong JCA (as His Lordship then was) in delivering the Court of Appeal's decision in *Melawangi Sdn Bhd v. Lim Kian Hian* held that:

[24] It is clear that Bundle B contains documents where the authenticity of the same is not disputed but contents are. What that means is simply this. *There is no requirement to call any evidence to prove the authenticity or existence of the document in question. However, if any party wants to rely on the contents of that document, he or she must call for the evidence, oral or otherwise, to prove the truth of the same.* Unless that is done, the trial Court cannot give any evidential value to the contents of that document. (emphasis added)

[68] As the photographs had been placed in Part B, the photographs are admitted evidence. TNB need not prove the authenticity of the photographs. It only has to call the maker of the photographs in order to rely on them. TNB had called SP2 who testified that he was the one who took the photographs. His evidence is corroborated by SP3 who testified that he had instructed SP2 during the site visit to go into the receiving pit to take the photographs.

[69] In fact, this first agreed issue to be tried between TNB and the defendant is not whether or not the cable was in fact damaged but "whether the cable was damaged as a direct result of the act of the defendant, its servants and/or agents, in carrying out the relevant piping works and/or the said pipe works."

Finding

[70] I find for the reasons discussed above and on the plain and ordinary reading of paras. 9, 10 and 13 of the final amended defence, the defendant does not dispute in its pleadings that the cable was damaged and that damage was caused by the pipe works.

[71] What is disputed by the defendant is whether the damage to the cable was caused by the negligence of the defendants and/or its contractors. While the defendant does not deny that the cable was damaged or that the pipe works caused the damage, it denies that the damage to the cable was caused by the defendant's and/or its contractors' negligence because the pipe works was carried out with reasonable skill and care and that the damage was not foreseeable and was too remote.

[72] The parties and this court are bound by the defendant's pleadings that the cable was damaged and that it was caused by the pipe works. Based on the principles of law on pleadings reiterated by the Federal Court in *Saiman bin Umar*, this court cannot make a finding of fact that the cable was not damaged or that the damage was not caused by the pipe works. Accordingly, I find that the answer to this first issue to be tried is in the affirmative; namely that the cable was damaged as a direct result of the act of the defendant, its servants and/or agents in carrying out the pipe-jacking works and/or pipe works.

Issue 2: Whether In Carrying Out The Relevant Piping Works And/Or The Said Pipe Works, The Defendant, Its Servants And/Or Agents Had Complied With The Conditions And Specifications Set Out By TNB?

[73] It is an express condition of the TNB 19 August 2010 letter, which condition was agreed and accepted by the defendant, that the defendant is to dig a trial hole for the receiving pit up to 4 metres in order to ascertain the location of the cable and in order to ensure that there is no existing TNB

cable at the location concerned ("lokasi terbabit") (see cls. 1 and 5 of the TNB 19 August 2010 letter). It is also a condition of the letter that once located, the defendant is to mark the route of the cable with a "danger tape". Clause 4 of the letter states that works near the TNB cable must be under the supervision of a competent employee from TNB's Jabatan Senggaraan Aset.

[74] Based on the entry in Semantra's site-diary, Semantra had dug the trial hole for the receiving pit on 3 September 2010 to the depth of 3 metres. It stopped digging the trial hole after encountering the monsoon drain. Semantra's site-diary dated 3 September 2010 recorded "piloting of receiving pit (2m x 2m x 3m deep)" and that the digging encountered an "RC drain, TNB 33kV cable and street lighting cable".

[75] SP1 testified that he was present at the site on 3 September 2010 when Semantra started digging the trial-hole. SP1 is TNB's employee, a certified "competent person", who was assigned to supervise the trial hole works to be carried out by the defendant and its contractors. He said that after some time on that same day, he was informed by Semantra that they had to stop work as they couldn't construct the trial hole any further and had to figure out their next course of action. SP1 said that the defendant's contractors took his telephone number and told him that they will contact him. He said the contractors did not tell him why they had to stop work. SP1 testified that he did not hear from the contractors again and he did not go back to the site again.

[76] The site-diary entries show that the digging of the trial hole or piloting was done only on 3 September 2010 and only up to a depth of 3 metres. Semantra stopped digging the trial hole after they encountered the monsoon drain (described as "RC drain" in 3 September 2010 entry in the site diary). The next entry in the site diary was on 21 September 2010 for the construction of the jacking pit and all the entries thereafter related to the excavation of the jacking pit and construction of the jacking pit and receiving pit. Apart from the entry on 3 September 2010, there was no more entry in the site-diary on the construction of the trial hole.

[77] Semantra's document entitled "Chronological *(sic)* of Works" records that on 3 September 2010 the works done was "piloting works at receiving pit (2m x 2m x 3m deep)" and on 26 September 2010 the works done was "piloting of jacking pit (3m x 6m x 3m deep)". From 27 September 2010 onwards, the entries in the "Chronological *(sic)* of Works" relate to construction of jacking pit and receiving pit. The entries from 29 November 2010 to 3 December 2010 are of "jacking of pipes". The entry on 4 December 2010 is "dismantling of equipment" and on 5 December 2010 is "dismantling of equipment and demobilization of jacking equipment *(sic)*".

[78] Clauses 1 and 5 of the TNB's 19 August 2010 letter states:

> 1. Kedudukan sebenar kabel-kabel TNB kawasan terlibat hendaklah terlebih dahulu dikenalpasti dan ditanda dengan "danger tape" di sepanjang laluan kabel. Lubang percubaan perlu dikorek untuk mengenal pasti kedudukan sebenar kabel TNB tersebut …
>
> …
>
> 5. Kerja-kerja pipe jacking pihak tuan hendaklah pada kedalaman minima 4m daripada paras jalanraya dan receiving pit hendaklah berada di tepi road curb selepas jalan raya. Receiving pit perlulah dijalankan lubang percubaan sedalam 4m untuk memastikan tiada kabel sediaada TNB dilokasi terbabit. Disamping itu, tuan juga diminta untuk kerja-kerja korekan terbuka (open cut) pada kedalaman maksima 1m daripada paras jalan raya.

[79] "Lubang percubaan" translated into English means "trial hole". Clause 1 requires the defendant to dig a trial hole to identify the exact location of TNB's 132KV cable and to mark the route of the cables with a "danger tape". The defendant is expressly required by cl. 5 to undertake a trial hole for the receiving pit of up to 4 metres to ensure that there are no existing TNB cables at the location.

[80] Based on the site-diaries, which are contemporaneous documents and "Chronological *(sic)* of Works" prepared by Semantra's director, SFP1 and certified the defendant's resident engineer Mr Siah Kai Ping, and Vital Projects, Semantra stopped the digging of the trial hole after 3 September 2010. The entries in the site diary show that Semantra dug the trial hole for the receiving pit only up to 3 metres, instead of 4 metres as required in TNB's 19 August 2010 letter.

[81] The facts show that defendant and its contractors also did not obtain TNB's prior approval or consent before commencing with the construction of the receiving pit, the jacking pit and the pipe jacking work. This fact is admitted during the trial by the defendant's, Vital Projects' and Semantra's own common expert witness, CEW1.

[82] The defendant's contractors did in fact find TNB's 132KV cable. Vital Projects in its letter dated 27 October 2010 informed the defendant that:

> … during the course of excavation, we have discovered 132KV cables situated at 3.2m depth. Due to the discovery, we are unable to proceed further with the construction of the proposed jacking pit and may require to perform a minor relocation of the intermediate jacking pit to avoid the 132KV cables.
>
> Due to the urgency of the project, we shall proceed to excavate a new intermediate jacking pit to restore our pipe jacking works as soon as possible.

[83] There was no reply from the defendant to Vital Projects' letter of 27 October 2010. On 6 November 2010, Vital Projects wrote a further letter to the defendant stating that it is "expected to complete the intermediate jacking pit by 7 November 2010 and shall commence jacking works on the *(sic)* 8 November 2010."

[84] The defendant did not inform TNB that its contractors had located the 132KV cable. Additionally, the defendant and its contractors, after the 132KV cable was located, did not mark the 132KV cable route with a "danger tape" as required pursuant to the conditions in TNB's 19 August 2010 letter.

[85] SFP1, who is the maker of the site diaries, denied that Semantra had abandoned the trial hole after 3 September 2010. During cross-examination, SFP1 testified that the phrase "construction of the receiving pit" in the site-diaries means "continuation of piloting". I find it difficult to believe the veracity of SFP1's testimony as it is contrary to contemporaneous entries in the site-diaries and Vital Project's letter dated 27 October 2010. Additionally, based on the natural and ordinary construction of the English language, it is impossible for me to agree with SFP1 that the phrase "construction of the receiving pit" means "continuation of piloting". I find that SFP1 was not honest in his testimony and I have accordingly, not attached any weight to his testimony in relation to the continued digging of the trial hole after 3 September 2010.

[86] Semantra pleads that the jacking of pipes was completed on 3 December 2010 and that they had handed the site to Vital Projects to install the "ms water pipe" on 4 December 2010. This is corroborated by the entries in Semantra's Summary of Works.

[87] The defendant in para. 13 of their final amended defence pleads that the pipe works "had been carried out by the contractors at a depth of more than 4 metres and the damage on the 132KV oil-filled cable is not foreseeable."

(i) Is The Survey Plan Admissible As Evidence?

[88] After the incident, Semantra engaged a licensed surveying firm, Suffian Geomatik Service Sdn Bhd., to conduct a survey to determine the depth of the installed pipes. The survey plan (in bundle B4 p. 227) shows that the jacking pipe was installed at a depth of 4.52 metres. The survey plan was done on 22 December 2010, which was almost three weeks after the electricity disruption incident and the joint site visit. SP3 testified that TNB was not informed of the survey and that the defendant and its contractors did not ask for a joint survey to be done with TNB. STP2 during cross-examination by TNB's counsel agreed that the purpose of preparing the survey was specifically to meet TNB's claim for their damaged cable.

[89] During the trial, Semantra did not call the maker of the survey plan as a witness. Instead it called SFP2, who is a Senior Manager with Suffian Geomatik Service Sdn Bhd. The survey plan was signed by Hj Megat Suffian bin Megat Yunus. The plan states that the measurement was done by Nik and the drawing by Abdul Kadir Abdullah. This is corroborated by SFP2 who testified that Nik did the measurements during the survey. Neither of these three gentlemen testified in court. SPF2 did not bring to court the file or any documents in which the measurements were recorded during the survey, which made it impossible for him to be cross-examined on the accuracy of the measurements on the plan.

(ii) Is The Survey Plan An Expert Opinion?

[90] TNB submits that because the survey plan was prepared by the surveyor, who is an expert in the area, the plan falls within the definition of opinion of expert within s. 45 of the EA 1950.

[91] Section 45 of the EA 1950 states as follows:

> (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.
>
> (2) Such persons are called experts.

[92] Expert evidence is only admissible to furnish the court with scientific or other information, which is likely to be outside the experience and knowledge of the judge (see *Syed Abu Bakar Ahmad v. PP* [1984] 2 MLJ 19 (FC); [1984] 1 CLJ 80; [1984] 1 CLJ (Rep) 368).

[93] What is meant by "science or art" in s. 45 of the EA 1950? Raja Azlan Shah J (as HRH then was) in *Chandrasekaran & Ors. v. Public Prosecutor* [1971] 1 MLJ 153; [1970] 1 LNS 11 held that the expression "science or art" in s. 45 of the EA 1950 is capable of wide interpretation. His Lordship held:

> **The expression "science or art" is elastic enough to be given a liberal interpretation.** If the Hanumanth decision was based on the premise that typewriting was not specifically mentioned in section 45, then equally there is no mention of handwriting or foot-print or telephony and yet the evidence of handwriting, foot-print or telephonic experts has been held admissible. So also of ballistic or medical experts who too have not been mentioned in section 45. (emphasis added)

[94] Furthermore, the court has a discretion to decide whether an issue is one of science or art and consequently whether expert evidence is admissible. In the Singapore case of *Leong Wing Kong v. Public Prosecutor* [1994] 2 SLR 54 (CCA), Yong Pung How CJ held:

> We turn now to the prior question, not raised by counsel, whether this was a situation where expert evidence within the meaning of section 47 [similarly worded to s. 45 of the Malaysian EA 1950] of the Evidence Act was admissible. As far as material to the present case, section 47 provides for the admission of expert evidence if the evidence covers an area of "science or art". The scope of the term has been widely construed and is not restricted to the subjects of pure science and art. Stephen's Digest (art 49) states that *the words should "include all subjects on which a course of special study or experience is necessary to the formation of an opinion". The Court has a discretion to decide whether an issue is one of science or art and consequently whether expert evidence is admissible.* (emphasis added)

[95] The defendant argues that the survey plan is not an expert report, as it was not tendered as an opinion. Counsel for the defendant submits that the survey plan was tendered to show that the pipe was installed at a depth of 4.5 metres.

[96] SFP2 testified that Suffian Geomatik Service Sdn Bhd is registered with Lembaga Jurukur Tanah Malaysia and that Hj Megat Suffian is a licensed land surveyor. In order to be issued a licence to practice as a land surveyor by the Lembaga Jurukur Tanah Malaysia, Hj Megat Suffian must have the necessary academic and professional qualifications in land surveying, just as a lawyer who is licensed to practice law by the Bar Council or a doctor licensed who is licensed to practice medicine by the Malaysian Medical Council must have the necessary qualifications. Nik, the surveyor, who did the measurements of the pits at the site, must also have the necessary qualifications to undertake the measurements for the purpose of the survey. Land survey is a subject which a course of special study and professional qualifications are necessary to the formation of an opinion.

[97] Moreover, a survey plan, which is a document prepared by a third party, would generally not be admissible unless it was the opinion of an expert falling within s. 45 of the EA 1950. This rule of evidence is explained by Augustine Paul FCJ in his book "*Evidence: Practice and Procedure*, 4th edn" at p. 512, where he said:

> This section [s.45 of the Evidence Act 1950] defines the situations in which expert opinion evidence is admissible. The opinions of third persons, though generally inadmissible become relevant in the instances enumerated in this section to enable the court to come to a proper decision.

[98] Accordingly, I have to respectfully disagree with the contention of learned counsel for the defendant that the survey plan is not an expert report. In this present case, I have to form an opinion on whether the pipe works "had been carried out by the contractors at a depth of more than 4 metres" as pleaded by the defendant. Without the expert opinion of a licensed qualified land surveyor, I am not able to form an opinion as to the depth of the jacking pit and receiving pit and of the pipe works as it is a specialised skill that is outside my knowledge and experience.

[99] Therefore, for the above reasons, I find that the survey plan falls within the definition of expert opinion under s. 45 of the EA 1950.

[100] As the survey plan is an expert opinion, pursuant to s. 60(1)(d) of the EA 1950, the opinion of the surveyor that prepared the survey plan as regards the depth of the pits and the pipe works must be proved by direct oral evidence of the expert who holds that opinion. As explained by Spenser Wilkinson J in *Wong Kok Keong v. Regina* [1955] MLJ 13; [1954] 1 LNS 125:

> The first point to be noted, I think, is that apart from Section 427 [of the Criminal Procedure Code] **a report made by any person is not evidence.** This is clearly laid down by **Section 60 of the Evidence Ordinance, which enacts with reference to the opinions of experts the "Oral evidence must in all cases whatever be direct:**
>
> (d) If it refers to an opinion or to the grounds on which that opinion is held, **it must be the evidence of the person who holds that opinion on those grounds.** (emphasis added)

[101] Therefore, the surveyor who prepared and signed the survey plan must come to court to testify on his survey report and be subject to cross-examination. However, Nik who did the measurement, Abdul Kadir who drew the survey plan and Hj Megat Suffian who signed the plan were all not called to give oral evidence during the trial. SFP2 was not the maker of the survey plan: he did not personally take the measurements, conduct the survey, draw the plan or sign the plan. He is also not a surveyor licensed by the Lembaga Jurukur Tanah Malaysia. The Court of Appeal in *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; [2011] 4 MLJ 805 held that:

> [58] As an opinion evidence, the expert must come to court to give evidence. Section 60(1)(d) of the Evidence Act 1950 states that direct oral evidence must be given in respect of the opinion of any person. **Thus, in the absence of such direct evidence from the "expert" his report cannot in law be admissible as evidence.** The lack of opportunity to cross-examine the "expert" on his report is another ground to disregard the "expert's" report. (emphasis added)

[102] Accordingly, as there is no direct oral evidence from the surveyor on the survey plan he prepared, the survey plan is not admissible as evidence in this suit.

[103] Pursuant to s. 103 of the EA 1950, the burden of proving the fact that the pipe works were carried out at a depth of more than 4 metres lies with the defendant. Section 103 of the EA 1950 provides:

103. The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

ILLUSTRATIONS

(a) A prosecutes B for theft and wishes the court to believe that B admitted the theft to C. A must prove the admission.

(b) B wishes the court to believe that at the time in question he was elsewhere. He must prove it.

[104] Therefore, as the survey plan is not admissible as evidence, the defendant has failed to prove that the pipe works were done by its contractors at a depth of more than 4 metres.

Finding

[105] It is clear from reading TNB's letters dated 12 July 2010 and 19 August 2010 that TNB has directed the defendant and its contractors must stop the pipe works until the exact site location of TNB's 132 KV cable is ascertained. It had stated in both letters that the pipe works could affect the safety of the cable.

[106] The evidence before this court shows that the defendant and its contractors did not dig a trial hole for the receiving pit of up to 4 metres. The defendant and its contractors proceeded with the pipe works before the 132KV cable was located. In fact, after the 132KV cable was located (as evidenced in Vital Project's letter dated 27 October 2010 to the defendant), the defendant and its contractors did not stop work. Instead, Vital Projects informed the defendant "Due to the urgency of the project, we shall proceed to excavate a new intermediate jacking pit to restore our pipe jacking works as soon as possible."

[107] Also, after it received Vital Projects' letter of 27 October 2010, the defendant did not inform TNB that the 132KV cable was located by its contractors. It also did not tell Vital Projects and Semantra to stop the pipe works.

[108] The defendant and its contractors also did not obtain TNB's prior approval or consent before commencing with the construction of the receiving pit, the jacking pit and the pipe jacking work. This fact is admitted by the CEW1, who is the defendant's, Vital Projects' and Semantra's common expert witness.

[109] Furthermore, SD1, who was the defendant's only witness during the trial, disagreed with TNB's counsel suggestion that the defendant had an obligation to interpret and strictly comply with the terms of the TNB's 19 August 2010 letter because the pipe works involved public utility

A installations and posed a danger to public safety. Notwithstanding the express terms in 19 August 2010 letter, SD1 also disagreed that the defendant had to ensure that its contractors comply with the terms of the said letter strictly.

[110] For these above reasons, I find that the defendant, its servants and/or agents in carrying out the pipe works had failed to comply with the agreed
B terms and conditions set out by TNB in its letter dated 19 August 2010.

Issue 3: Whether The Defendant Was In Negligence, Wilful Neglect And/Or Breach Of Their Duty Of Care In Carrying Out The Relevant Piping Works And/Or The Said Pipe Works?

C **[111]** The defendant owed TNB a contractual duty to identify the exact location of the cable before commencing the pipe-jacking works. It is also under a statutory obligation under the ESA 1990 to obtain TNB's authority in order to undertake the pipe works. Section 37(12)(a) of the ESA 1990 states:

D
> No person shall without the lawful authority of the supply authority or the licensee, as the case may be, undertake any work or engage in any activity in the vicinity of any electrical installation or part thereof as may be prescribed, in a manner likely to interfere with any electrical installation or to cause danger to any person or property.

E **[112]** Additionally, the defendant and its contractors owe TNB a duty of care at common law to identify the exact position of the cable before commencing with the pipe works and a duty of care to carry out the pipe works without damaging the cable. The evidence shows that defendant failed to ensure that its contractors found the exact location of the cable before
F constructing the receiving pit and carrying on the pipe-jacking work. The defendant's and its contractors' breach of duty of care resulted in the damage to the cable. As pleaded, the defendant does not deny that the cable was damaged by the pipe works.

[113] For these reasons, I find that the defendant and its contractors were
G negligent and/or in breach of their duty of care in the carrying out of the pipe works.

(i) Non-delegable Duty Of Care

[114] Further, I find that the defendant owes the plaintiff a non-delegable
H duty of care. I find that the non-delegable duty owed by the defendant to the plaintiff falls within the second category of non-delegable duty identified by Lord Sumption in *Woodland v. Essex County Council* [2014] 1 All ER 482, which is as follows:

I
> [7] The second category of non-delegable duty is, however, directly in point. It comprises cases where the *common law imposes a duty on the defendant which has three critical characteristics. First, it arises* not from the negligent character of the act itself but *because of an antecedent relationship*

> *between the defendant and the claimant. Second, the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks,* and not simply a duty to refrain from acting in a way that foreseeably causes injury. *Third, the duty is by virtue of that relationship personal to the defendant.* The work required to perform such a duty may well be delegable, and usually is. But the duty itself remains the defendant's. Its delegation makes no difference to his legal responsibility for the proper performance of a duty which is in law his own. In these cases, the defendant is assuming a liability analogous to that assumed by a person who contracts to do work carefully. The contracting party will normally be taken to contract that the work will be done carefully by whomever he may get to do it: see *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock). (emphasis added)

[115] Similar to the defendant in *Woodland v. Essex County Council*, (i) the defendant's non-delegable duty to TNB arose because of the antecedent relationship between the defendant and TNB ie, the agreement to comply with the terms and conditions in TNB's 19 August 2010 letter; (ii) the duty is a positive duty to protect TNB's 132KV cable and the public, who are users of electricity distributed/transmitted *via* the cable; and (iii) the duty is by virtue of that relationship, which is personal to the defendant.

[116] The defendant was under a duty to find the exact location of the cable before commencing the pipe works. While it can delegate the work to Vital Projects and Semantra, the duty to find the exact location of the cable remains the defendant's pursuant to the conditions of the TNB's 19 August 2010 letter.

[117] The principles of non-delegable duty established in *Woodland v. Essex County Council* was followed with approval by the Court of Appeal in *Tenaga Nasional Bhd v. Syarikat Bekalan Air Selangor Sdn. Bhd & Anor* [2017] 6 CLJ 356; [2018] 1 MLJ 810. In that case, TNB sued Syarikat Bekalan Air Selangor Sdn Bhd ("SYABAS") and its contractor for negligently damaging a section of its 132KV underground cables while doing excavation work. The Court of Appeal allowed TNB's appeal and held that SYABAS owed a non-delegable duty of care and had to ensure that its contractors performed their task with reasonable care. David Wong JCA (as His Lordship then was) in delivering the judgment of the Court of Appeal held that:

> [16] In a normal negligence action for damages, the necessity to prove fault on the part of a defendant is a condition precedent to affix liability. That is not the case when an action is premised on a contention that the defendant owes a 'non-delegable' duty to a plaintiff. In such a claim, the plaintiff is required to establish, in the circumstance of the case, that the defendant has a duty to ensure that another party takes reasonable care in its discharge of its duty of care. *Under such non-delegable duty concept, a defendant cannot plead as a defence that the other party is an independent contractor not under its control. Put it in another way, the fault of the defendant is irrelevant,*

A *what is relevant is that the defendant has to ensure that the other party has performed its task with reasonable care. If the other party had been negligent in its task, the defendant would be liable for such negligence.* (emphasis added)

[118] Like in this present case, SYABAS in *TNB v. SYABAS* failed to do the pilot trenching required by TNB to locate its 132KV cable before B commencing work. His Lordship observed that:

> [20] It is plain and obvious that any excavation work by the first respondent [SYABAS] would likely encounter the underground cables of the appellant [TNB]. So it is not surprising, that the first respondent was required by s. 40 of the Street, Drainage and Building Act 1974 to obtain C a permit from Dewan Bandaraya Kuala Lumpur to carry out such excavation work. Such permit was obtained by the first respondent for the relevant works (see D8). Not insignificant in the aforesaid permit, there was a specific requirement on the part of the first respondent to obtain the permission from the appellant prior to commencement of work and more importantly to do pilot trenching in concert with the appellant to D locate the exact position of the underground cables so as to avoid any damage to the same. However as pointed out by counsel for the appellant, no such pilot trenching was done by the first respondent or the second respondent.

[119] I have to respectfully disagree with the submission of defendant's E counsel that *TNB v. SYABAS* case can be distinguished because both the plaintiff and defendant are public utility companies and that *Woodland v. Essex County Council* can be distinguished because the claimant in that case was a minor who was especially vulnerable or dependant on the defendant against the risk of injury.

F **[120]** In my view, to distinguish both these cases on the facts as suggested by defendant's counsel is to ignore the actual legal principles relating to non-delegable duty as discussed by David Wong JCA (as His Lordship then was) in *TNB v. SYABAS* and Lord Sumption in *Woodland v. Essex County Council* respectively. To my mind, it is not unlike trying to ignore the basic G principles of contract or the tort of negligence by distinguishing cases, where these principles are applied, on their facts.

Issue 4: If The Answer To Issue 2 Is In The Affirmative, Whether The Damage Caused To The Cable Was Reasonably Foreseeable?

H **[121]** TNB had the outset told the defendant's engineering consultant, APEC, that the defendant must stop the pipe works until the exact location of the cable is ascertained as the pipe works could affect the safety of the cable. TNB also arranged for a joint site visit on 16 August 2010 to the proposed location of the pipe works, where TNB's representative showed the defendant and its contractors the general route of the cable and the position I at which TNB wanted the defendant and its contractors to dig the trial hole.

In the TNB's 19 August 2010 letter, TNB reiterated that the defendant was to stop the pipe works until the exact position of the cable was located. As discussed above, TNB expressly stated in the said letter that the location of the cable must first be identified and the cable route marked with a "danger tape". A

[122] SP3 testified that the cable was installed on or about 1986 at a depth of approximately 1.6 metres below the road surface and that over the years, the road above the cable had been resurfaced by approximately 2 metres due to the construction of the SPRINT highway. TNB's assessment is that the cable should not be at a depth of more than 4 metres. Hence, TNB's stipulation that the trial hole is to be 4 metres deep. B C

[123] The evidence shows that after encountering the monsoon drain, the defendant and its contractors, without consulting TNB, unilaterally decided to proceed with the construction of the receiving pit next to the location of stipulated by TNB for the trial hole. Also, in breach of the conditions of the TNB's 19 August 2010, Semantra constructed the receiving pit at the green area beside the road curb without first locating the cable. D

[124] SP3 testified that during the joint visit to the site on 5 October 2010 after the disruption to the electricity supply, he asked the defendant's contractors to dig at the wall of the receiving pit in the direction below the road curb and under the monsoon drain. The damaged cable was found to be under the monsoon drain at the location where TNB had directed the defendant to dig the trial hole. CEW1, the common expert for the defendant, Vital Projects and Semantra, during the trial expressed the opinion that Semantra could have continued digging the trial hole under the monsoon drain by shoring up the drain. E F

[125] For the reasons above, I find that the damage to cable was foreseeable and not too remote.

Issue 5: Whether TNB Is Entitled To Rely On The Maxim Of "Res Ipsa Loquitor"

[126] "*Res ipsa loquitor*" is a Latin term, which in English means, "the thing speaks for itself". It is a circumstance where this court can infer negligence on the part of the defendant if TNB can show that the nature of damage to the cable suggests both negligence and the defendant's responsibilities. The maxim is explained by the editors of *Clerk & Lindsell on Torts*, 20th edn at p. 542 as follows: G H

> It is only a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. *Res ipsa loquitor*, which stems from the judgment of Erle CJ in *Scott v. London v. St Katherine Docks* (1865) 3 H. & I

A C. 596 at 601, applies where (1) the occurrence is such that it would not have happened without negligence, and (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, B must have been negligent. There is, however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitor* is inappropriate for the question of the defendant's negligence must be determined on that evidence.

[127] NH Chan JCA in *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 MLJ 525; C [1998] 4 CLJ 416 (CA) citing Megaw LJ in *Lloyde v. West Midlands Gas Board* [1971] 1 WLR 749, described *res ipsa loquitor* as follows:

> … *res ipsa loquitur* as in essence no more than a common sense approach to the effect of the evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (i) it is not possible for D him to prove precisely how the accident happened, but (ii) on the evidence as it stands, he manages to show that the accident could not have happened without negligence on the part of the defendant.

[128] As succinctly summarised by the editors of *Clerk & Lindsell on Tort*, to rely on *res ipsa loquitor*, the claimant "merely proves a result, not any E particular act or omission producing the result". Therefore, in order to for TNB to rely on *res ipsa loquitor*, it must be shown that:

(i) the damage to the cable could not have happened without negligence;

(ii) the damage was caused by something under the sole management and F control of the defendant or someone for whom it is responsible or whom it has a right of control; and

(iii) the exact cause of the damage is not known.

(i) Could The Damage To The Cable Have Happened Without Negligence?

G **[129]** The evidence shows that defendant's contractors had commenced digging the trial hole at the location specified by TNB on 3 September 2010 supervised by SP1. However, the digging of the trial hole stopped on the same day at a depth of 3 metres when Sementra encountered the monsoon drain. The defendant and its contractors then, without consulting TNB, H unilaterally decided to proceed with the construction of the receiving pit next to the original location of the trial hole after encountering the monsoon drain. Semantra constructed the receiving pit at the green area beside the road curb without first locating the cable.

[130] SP3 testified when he went to the site with SP2 on 5 December 2010 I (the day after the disruption to the electricity supply on 4 December 2010), he noticed that the defendant's contractors had already constructed the receiving pit at the green area beside the road curb. He also noticed that the

receiving pit was not done at the location specified by TNB and that there was no trial hole done. SP3 said he asked the defendant's contractors to dig at the wall of the receiving pit in the direction below the road curb and under the monsoon drain, which was at the location where the defendant was supposed to have completed its trial hole. It exposed the damaged cable.

[131] The disruption in the electricity supply was caused by the damage to the cable in the location where Semantara was carrying out the pipe jacking works. The disruption occurred a day after Semantra completed the pipe-jacking works where the cable was located. The evidence shows that Semantra failed to dig the trial hole to the required depth of 4 metres at the stipulated location. It also did not locate the cable or take necessary measures to protect the cable before digging the receiving pit and commencing the pipe-jacking works at the area where TNB had said the cable was located.

[132] Accordingly, I find that it can be inferred that the damage to the cable could not have happened without negligence.

(ii) Was Damage Caused By Something Under The Sole Management And Control Of The Defendant, Or Of Someone For Whom It Is Responsible Or Whom It Has A Right To Control?

[133] The defendant had at all material times communicated directly with TNB and represented itself to TNB as the owner and principal in respect of the pipe works. The defendant agreed and accepted the condition in cl. 6 of the TNB's 19 August 2010 letter, to be fully responsible for all the activities relating to the pipe works or any other activity carried out at the location that caused any damage to TNB's cables and/or other installations. It also agreed to fully indemnify TNB for any damage to TNB's cables, rectification works of such damage, loss (kerugian) because of loss (kehilangan) of electrical sales and any third-party claims. Accordingly, the defendant is contractually responsible for all the activities relating to the pipe works at the location.

[134] The defendant submits that it did not have control over the site when the damage occurred. Its contention is based on SFP1's agreement to defence counsel's suggestion during cross-examination that Semantra had taken over the possession of the site for the pipe-jacking works.

[135] I have to respectfully disagree with the defendant's contention. The contention ignores the express terms of the contractual agreement between the defendant and TNB, that the defendant will be fully responsible for the pipe works at the site.

[136] The defendant's only witness during the trial, SD1, testified that Mr Siah Kai Ping, was in charge as the defendant's resident engineer for the project and the pipe works. Semantra's site diaries show that every page of daily entry in Semantra's site-diary was signed by Mr Siah, which indicates

that he was present at site during the pipe-jacking works every day. Also, Mr Siah was the defendant's representative during the joint site visit with TNB on 16 August 2010, where TNB's representative showed the defendant and its contractors the general route of the cable and the position at which TNB wanted the defendant and its contractors to dig the trial hole.

[137] The defendant, without proffering any explanation, failed to call Mr Siah as a witness in this case even though he is still in the defendant's employ. Learned counsel for TNB invited this court to draw adverse inference under s. 114(g) of the EA 1950 against the defendant for failing to call Mr Siah to testify. Section 114 of the Evidence Act deals with rebuttable presumption of facts. It enables this court to "presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case". Illustration (g) in s. 114 states:

> The court may presume that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it.

[138] The Supreme Court in *Munusamy Vengadasalam v. PP* [1987] 1 MLJ 492; [1987] CLJ Rep 221; [1987] 1 CLJ 250 held that adverse inference can be drawn from the failure to produce of a material witness to the case. In the recent case of *Chua Yung Kim v. Madlis Azid & Ors* [2018] 1 MLJ 192; [2018] 3 CLJ 47, the Court of Appeal held that the trial judge was entitled to draw adverse inference against the appellant under s. 114(g) of the EA 1950 for the non-production of a material witness.

[139] Mr Siah, as the defendant's resident engineer of the project and the pipe works, who had sign-off on the daily entries in Semantra's site-diaries while the pipe-jacking works were carried out, is clearly a material witness. Accordingly, I am drawing adverse inference under s. 114 (g) of the EA 1950 against the defendant for failing to call Mr Siah as a witness, in that if he was produced as a witness in this case, his evidence would be unfavourable to the defendant.

[140] The defendant is contractually responsible for the pipe works pursuant to the terms of the agreement between the defendant and TNB set out in the TNB's 19 August 2010 letter. The documentary evidence, in the form of the contemporaneous site-diaries, show that the pipe works were supervised by the defendant's resident engineer. For these reasons, I find that the cause of the damage to the cable was something under the management and control of the defendant's contractors for whom it is responsible for.

(iii) Was The Exact Cause Of The Damage To The Cable Known?

[141] The cable was buried approximately 4 metres underground beneath the monsoon drain underneath the SPRINT Highway beside the road curb. The damage was only discovered by TNB's fault-finding team after the electricity disruption. The electricity disruption happened on 4 December 2010, which based on Semantra's site-diary is one day after Semantra completed the pipe-jacking works and the day it dismantled its equipment. Accordingly, the exact cause of the damage to the cable is not known.

[142] It is not disputed that the exact cause of the damage of the cable is not known. The defendant itself submits (see para 38 of the defendant's written submissions) that none of the witnesses actually saw the contractor's pipes damaging the cable.

(iv) Is The Defendant's Alternative Explanation For The Damage To The Cable Sufficient To Displace The Inference Of Negligence?

[143] When a plaintiff, establishes a *prima facie* inference of negligence, the burden then shifts onto the defendant to give a probable explanation of how the incident could have happened without negligence on his part or someone he is responsible for.

[144] The principle is explained by Viscount Simon in *Woods v. Duncan* [1946] AC 401 at pp. 419 and 439, where he said:

> The case against Lieutenant Woods has been put as an application of the principle known as *res ipsa loquitur*, since he was in charge of the forward compartment. Even so, *that principle only shifts the onus of proof, which is adequately met by showing that he was not in fact negligent.* He is not to be held liable because he cannot prove exactly how the accident happened.
>
> …
>
> But to apply this principle, is to do no more than shift the burden of proof. *A prima facie case is assumed to be made out, which throws upon him, the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the court that he personally was not negligent.* It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause, is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered; yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs' case must fail. (emphasis added)

[145] In *Bennett v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 at p. 1575, Davies LJ explained *res ipsa loquitor* and the shifting of the burden of proof onto the defendant to show how the accident could have happened without his negligence, as follows:

A In my view it is not necessary for that doctrine to be pleaded. If the accident is proved to have happened in such a way that *prima facie*, it could not have happened without negligence on the part of the defendants, then it is for the defendants to explain and show how the accident could have happened without negligence.

B **[146]** The defendant raised the following possible causes of damage in answer to TNB's inference of negligence on the part of the defendant and its contractors:

(i) that the photographs taken by SP2 and shown in bundle B4 pp. 15-23, were not taken at the site and what was shown is not the cable which
C is the subject-matter of this present suit. According to STP2, this contention is based on other photographs taken by SP2 himself. However, STP2 was not present at the site inspection after the electricity disruption and he did not produce any evidence to contradict SP2's and SP3's evidence that SP2 took the photographs of the damaged cable;

D (ii) That there was no cable inside the ducting. This alternative proposition is based on the opinion of STP2 who not only was not present at the site inspection but whose opinion is not supported by any evidence or expert report. Moreover, STP2 is a witness of fact and not an expert;

E (iii) Contrary to their propositions in (i) and (ii) above, the defendant contends that the photographs in B4 pp. 15-23, show that the damage to the cable was "immediate and severe". Accordingly, the defendant argues that the pipe-jacking work could not have damaged the cable as the pipe-jacking work was completed on 3 December 2010, whilst the damage to the cable occurred on 4 December 2010. Again, the defendant
F made this proposition based on STP2's opinion, whose opinion is based on the photographs alone. Confoundingly, these are the same photographs which the defendant allege were not taken by SP2 at the site of the damaged cable;

G (iv) That the cable was already leaking and damaged prior to the pipe-jacking works because of the changes in oil-pressure insulating the cable. SP3, who is TNB's engineer in charge of its 132KV cable, explained that changes in the oil pressure reading does not necessarily mean that there is a leak or that the cable is damaged. SP3 testified that there are other reasons why an oil-filled cable's oil-pressure reading will increase or
H decrease. These fluctuations in the oil-pressure could be (1) due to the temperature. If the temperature increases, the pressure will also increase; (2) due to cable loading. When the loading is high, the pressure will increase; and (3) due to TNB's "Relo" project ie, a loop in-loop out project.

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[147] SP3 explained that a "Relo" project is where a cable is connected from substation A to substation B but there is a project cable in between the substations and the cable is looped to substation C. So the alignment will be from substation B to C and from substation A to C. SP3 explained that during this process, the pressure in the cable may increase or decrease because they are working on the cable such as doing jointing.

[148] SP3 testified that there was a cable "Relo" project for the said cable in 2010. He explained that the cable was initially from PMU Damansara Heights to PMU Dang Wangi. And that in 2009 and 2010, there was a project to "Relo" the cable from PMU Damansara to PMU Brickfields and from PMU Brickfields to PMU Dang Wangi. SP3 testified that this "Relo" project of the cable would have had on impact on the oil-pressure readings.

[149] The evidence shows that the cable was always in proper working order since its installation. No alarm was triggered prior to the pipe-jacking works despite the changes in oil pressure. This is confirmed by SP1, SP2 and SP3, based on TNB's recording of the oil-pressure reading and inspection of the alarm system as part of its maintenance of the cable.

[150] In contrast, the defendant's alternative explanation in para. [146] (iv) above that the cable was already leaking and damaged prior to the pipe-jacking works is not supported by any evidence. The defendant's case is based on the opinion of STP2 that the changes in the oil pressure of the cable was not caused by any other factors but leaking. However, STP2 is not an independent witness: he is a director of Vital Projects is witness of fact for Vital Projects. Furthermore, he is not an expert on oil-filled 132KV electricity cables. Accordingly, I have not accorded any weight to STP2's opinion in relation to the cable.

[151] For the reasons above, I find that the defendant's, Vital Projects' and Semantra's case on the possible causes of damage insufficient to displace the inference of negligence on the part of the defendant and its contractors.

Finding

[152] Based on the above, I find that TNB has successfully shown all the necessary ingredients to rely on *res ipsa loquitor*, namely:

(i) that the damage to the cable could not have happened without the negligence of the defendant and its contractors;

(ii) that the damage was caused by the pipe works, which was under the control of Vital Projects and/or Semantra, who are contractors which the defendant is responsible for and who it has a right of control; and

(iii) that the exact cause of the damage to the cable is not known.

[153] Furthermore, as discussed above, I find that both the alternative proposition that the cable was not in fact damaged and the alternative causes of damage to the cable put forward by the defendant, Vital Projects and Semantra are insufficient to displace the inference of negligence on the part of the defendant and its contractors.

[154] Therefore, for the above reasons, I find that TNB can rely on the maxim of *res ipsa loquitor*.

Third Party Proceedings Between The Defendant And Vital Projects

[155] The third party proceedings by the defendant against Vital Projects are separate from TNB's action against the defendant. However, during the trial, Vital Projects did not adduce any evidence to show that it had fully complied with the terms and conditions of the letter of award from APEC, on behalf of the defendant, dated 16 July 2010, which includes compliance with the conditions imposed by TNB. As discussed above, Vital Projects like the defendant decided to depart from their pleaded case during the trial and argue that the cable was not in fact damaged.

[156] I find that Vital Projects had a duty of care to ensure that all the works envisaged under the contract for the pipe works were conducted in a proper manner so as not to damage the cable. It also had a contractual duty pursuant to the letter of award to ensure that the pipe works were carried out in accordance with conditions imposed by the authorities including TNB.

[157] Based on the evidence adduced during the trial, I find that Vital Projects had failed to comply with the terms and conditions of the letter of award of 16 July 2010 and had breached its duty of care owed to the defendant during the performance of the pipe works.

[158] During the submissions stage, after all the parties had closed their case at the conclusion of the trial, Vital Projects did not make any submissions as to why it should not fully indemnify the defendant for the damage to the cable in the event that this court found that the defendant is liable to TNB for the damage to cable.

[159] Accordingly, I find that the defendant is entitled to full indemnity from Vital Projects for damages and costs that the defendant is liable to pay the plaintiff.

[160] Based on the letter of award dated 16 July 2010, I find that Vital Projects is entitled to its counterclaim from the defendant for the balance of contract price for the pipe works. The defendant is entitled to set-off the balance of the contract price owed against the damages and costs that the defendant is liable to pay the plaintiff.

Fourth Party Proceedings Between Vital Projects And Semantra

[161] The fourth party proceedings between Vital Projects and Semantra is separate from the third party proceedings and TNB's main action against the defendant.

[162] Semantra owed a duty to Vital Projects to carry out the pipe-jacking works in accordance with the terms and conditions evidenced in the letter of award dated 8 October 2010 from Vital Projects, which includes full compliance with TNB's requirements and conditions. It also owed Vital Projects a duty of care that the pipe-jacking works were carried out in a proper manner without causing any damage to the cable.

[163] However, during the trial, Semantra did not adduce any evidence to show that it had fully complied with the terms and conditions of the letter of award, including the conditions imposed by TNB, and that it had not breached its duty of care to Vital Projects. During the trial, Semantra's case was that the cable was not damaged and it could not have damaged the cable because the pipe-jacking works were done at a depth of more than 4 metres. However, for the reasons discussed above and based on available evidence, this court has found that Semantra had failed to dig the trial hole to a depth of 4 metres; that it had commenced the pipe-jacking works before the 132KV was found and made safe; and before approval was obtained from TNB to commence the pipe works.

[164] Like Vital Projects, after the parties had closed its case at the conclusion of trial, during submissions before this court, Semantra did not make any submissions as to why it should not fully indemnify Vital Projects for the damage to the cable in the event that this court found the defendant liable to TNB for the damage to the cable.

[165] Accordingly, I find that the Vital Projects is entitled to full indemnity from Semantra for the damages and costs to be paid by the Vital Projects to the defendant.

Decision

[166] For the reasons above, I find that TNB has proven on a balance of probabilities that the cable was damaged and that the damage was caused by the defendant's and/or its contractors' negligence and/or breach of duty of care.

[167] I also find that TNB is entitled to rely on the maxim of *res ipsa loquitor* in proving its claim against the defendant in this case.

[168] Further, I find that the defendant owes TNB a non-delegable duty of care.

[169] I also find that the defendant has failed to prove on a balance of probabilities that TNB was contributorily negligent in causing the damage to the cable. Accordingly, the defendant's claim for contributory negligence against TNB is dismissed.

[170] Therefore, I find that the defendant and its contractors are liable for negligence and/or breach of duty of care owed to TNB for the damage caused to TNB's underground 132KV oil-filled cable located between Joint Bay 5 and Joint Bay 6 of PMU Damansara Heights to PMU Brickfields.

[171] I hereby order as between the plaintiff and the defendant that:

(a) damages for the reinstatement/replacement of the said cable to be assessed by this court. The Deputy Registrar has the jurisdiction to decide on the type of replacement cable;

(b) general damages for the defendants and its contractors' negligence to be assessed by this court;

(c) interest at the prevailing rate on all sums adjudged to be due from the defendant to the plaintiff from 4 December 2010 until the date of full settlement of the judgment sum; and

(d) costs of RM80,0000 to be paid by the defendant to the plaintiff subject to the payment of allocator fee.

[172] As between the defendant and the third party, I find that:

(a) the third party has breached its duty of care during the performance of the works relating to the "Integrated Water Supply Works for Proposed Serviced Apartments on Part of Lot 5787, Jalan Damanlela, Kuala Lumpur" to ensure that all the works envisaged under the contract between the defendant and third party was conducted in a proper manner and in compliance with the conditions stipulated in TNB's letter dated 19 August 2010;

(b) the defendant is entitled to full indemnity from the third party for damages and costs to be paid by the defendant to the plaintiff;

(c) that the third party is entitled to its counter-claim from the defendant for the balance of contract price for the pipe works; and

(d) the defendant is entitled to set-off the balance of the contract price owed to the third party against the damages and costs that the defendant is liable to pay the plaintiff as assessed by this court.

[173] As between the third party and the fourth party, I find that:

(a) the fourth party has breached its duty of care to the third party during the performance of the pipe-jacking works to ensure that all the works envisaged under the contract are conducted in a proper manner without causing any damage and in compliance with the conditions stipulated in TNB's letter dated 19 August 2010; and

(b) the third party is entitled to full indemnity from the fourth party for damages and costs to be paid by the third party to the defendant.

[174] So ordered accordingly.